UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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Peter A. Nedd,

Plaintiff,

- against -

Home Depot,

Defendant.

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CV-95-4699 (CPS)

MEMORANDUM AND ORDER

SIFTON, Chief Judge

Peter Nedd sued his former employer, Home Depot, alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. Proceeding *pro se*, Nedd argued his case to a jury beginning January 12, 1998. On January 15, 1998 the jury returned a verdict awarding Nedd $210,000 in compensatory damages and $1,000,000 in punitive damages. Presently before the Court are plaintiff's motion to amend the complaint to conform to the proof at trial and Home Depot's application to reduce the award to $300,000 under the applicable statutory scheme. For the reasons set forth below, plaintiff's motion is denied, and defendant's motion is granted in part and denied in part.

BACKGROUND

Peter Nedd was fired from the Home Depot on March 11, 1995. Mr. Nedd, who is black, alleges that he was treated

differently than were white employees during his employment and that he was fired and then not re-hired because of his race. Plaintiff brought the instant action under Title VII and represented himself during pretrial motions and at trial.

From the evidence adduced at trial, the jury could have found that Home Depot denied Nedd prompt access to medical care after he was injured in the workplace, delaying his eventual trip to the hospital by a number of hours. The jury could further have concluded that Home Depot's actions in this regard were either motivated by plaintiff's race or by stereotypes about the behavior of persons of plaintiff's race.

The parties further disputed the events leading up to Nedd's termination. While Home Depot alleged that Nedd was fired because he posed a threat to his co-workers, the jury could reasonably have found that the only "source" from which Home Depot could derive a potential threat is stereotypes about the dangers posed by large black men. While Nedd is, indeed, a physically large individual, no evidence was adduced to suggest that he has ever assaulted, threatened, or in any way imperiled anyone. On the contrary, the evidence suggests that Nedd, a Jehovah's Witness minister, has devoted his adult life to activities designed to foster peace in the community. The jury could further have credited Nedd's account that on the date of his termination his immediate supervisor called him a "nigger," despite the supervisor's testimony that he never uses, or used, such epithets. Finally, the jury could reasonably have found

that racist cartoons left in Nedd's locker at work were left there by Home Depot employees.

After two days of trial and two days of deliberation, the jury returned a verdict in favor of Nedd. Its verdict form stated that plaintiff was entitled to $210,000 in compensatory damages and $1,000,000 in punitive damages. The jury was instructed that compensatory damages, on the facts of the case as adduced by the evidence, included past pain and suffering and past economic loss.

After trial, Home Depot moved to reduce the verdict to $300,000, pursuant to the limitations on damages set forth in 42 U.S.C. § 1981a. In response, plaintiff retained counsel and moved to amend his complaint to state claims under 42 U.S.C. § 1981 and the New York Human Rights Law, N.Y. Exec. L. § 296, and to state a claim for intentional infliction of emotional distress.

DISCUSSION

I address first plaintiff's motion to amend the complaint and then turn to defendant's motion to reduce the verdict.

Plaintiff's Motion to Amend the Complaint

Under the Federal Rules of Civil Procedure, a complaint may be amended even after trial of the action. Specifically,

> [w]hen issues not raised by the pleadings are tried by express and implied consent of the parties, they shall be treated in all respects as if they had been raised

> in the pleadings. Such amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment.

Fed. R. Civ. P. 15(b). Plaintiff focuses on the Federal Rules' preference for amending pleadings in the interest of justice. He notes that he proceeded *pro se* through the pleading and trial phases of this action and cites the Supreme Court's oft-repeated admonishment that *pro se* complaints are to be read liberally. *See Haines v. Kerner*, 404 U.S. 519 (1972) (per curiam). Specifically, plaintiff notes that he used the standard form complaint for employment discrimination actions provided to him by the Clerk's Office of this District, which only allowed him to choose among three causes of action: Title VII of the Civil Rights Act, which plaintiff chose, and the Age Discrimination in Employment Act and the Americans with Disabilities Act, neither of which is applicable. Mr. Nedd now asserts, through counsel, that he had from the outset valid claims under 42 U.S.C. § 1981, the New York Human Rights Law, and the common law tort of intentional infliction of emotional distress. Since, Nedd claims, these causes of action are substantially similar, in terms of their evidence and elements, to the Title VII claim tried to the jury, he should be allowed to amend the complaint to state them.

As Home Depot notes, however, plaintiff misconstrues the law. Rule 15(b) does not ask whether the proposed new cause of action is "similar" to that tried but whether Home Depot

consented, either expressly or impliedly, to try the proposed claims. The mere fact that evidence "relevant to both pled and unpled issues ... was introduced without objection does not imply consent at trial of the unpled issues, absent some obvious attempt to raise them." *Luria Bros. & Co., Inc. v. Alliance Assur. Co., Ltd.*, 780 F.2d 1082, 1089 (2d Cir. 1986). Rule 15(b) is intended to "allow the pleadings to conform to issues actually tried, not to extend the pleadings to introduce issues inferentially suggested by incidental evidence in the record." *Browning Debenture Holders' Comm. v. DASA Corp.*, 560 F.2d 1078, 1086 (2d Cir. 1977). Plaintiff points to no instance in the record in which evidence was introduced that was not directly relevant to the termination and failure to rehire claims. Plaintiff further identifies no instances in which evidence regarding intent, contract, or supervision was introduced. As set forth below, these issues are not relevant in a claim under Title VII but are relevant to claims under Section 1981, the New York Human Rights Law, and the tort of intentional infliction of emotional distress. Absent some showing that Home Depot consented, either expressly or impliedly, to try issues outside those raised by the complaint, plaintiff's motion to amend the complaint after trial must be denied.[1/]

[1/] At oral argument, counsel for Mr. Nedd asserted that the issue of consent was relevant only to considerations under Rule 15 and that, were I to permit plaintiff to amend his complaint under the Court's inherent power, rather than under Rule 15, consent would become irrelevant. Since I hold in the body of this memorandum that plaintiff cannot establish any of the causes of action that he seeks to add, I need not determine whether consent is relevant to the

(continued...)

In all events, even were plaintiff to successfully demonstrate consent to amend the pleadings and a lack of prejudice to Home Depot, I would deny plaintiff's motion on a separate ground: the evidence adduced at trial cannot, as a matter of law, sustain any of the claims plaintiff seeks to add. I address each of the proposed additional claims in turn.

A. *Section 1981*. The first claim that plaintiff seeks to add is an action under 42 U.S.C. § 1981. That section provides in relevant part:

> (a) Statement of equal rights
> All persons ... shall have the same right ... to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens ...
>
> (b) "Make and enforce contracts" defined
> For the purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

As plaintiff notes, the *McDonell Douglas* system of burden-shifting applicable to Title VII actions also applies to Section 1981. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Kim v. Nash Finch Co.*, 123 F.3d 1046, 1056 (9th Cir. 1997) (adding Section 1981 claim after judgment in Title VII action).

While the tests for proving a violation of the statutes are identical, however, the statutes cover different conduct. Specifically, Section 1981 governs contractual relationships.

[1/] (...continued)
determination of whether plaintiff should be permitted to amend his complaint outside the constraints of Rule 15.

Plaintiff was an at-will employee of defendant, working without a contract. Recognizing this infirmity in his attempt to add a Section 1981 claim and recognizing that Judge Spatt dismissed a Section 1981 claim under similar circumstances just last year, *see Moorer v. Grumman Aerospace Corp.*, 964 F. Supp. 665, 675-76 (E.D.N.Y. 1997), plaintiff argues that *Moorer* was wrongly decided. While I note that the Second Circuit summarily affirmed *Moorer* without comment, relying on the grounds set forth in Judge Spatt's opinion, *see Moorer v. Grumman Aerospace Corp.*, 1998 U.S. App. Lexis 3233 (2d Cir. Feb. 27, 1998), and that other courts from this Circuit have held that Section 1981 claims cannot be asserted by an employee working without a contract, *see, e.g., Simpson v. Vacco*, __ F. Supp. ___, 1998 WL 118155 (S.D.N.Y. Mar. 17, 1998); *Moscowitz v. Brown*, 850 F. Supp. 1185, 1192 (S.D.N.Y. 1994), as have other circuits, *see Spiller v. Ella Smithers Geriatric Center*, 919 F.2d 339, 344 (5th Cir. 1990),[2/] this area of law is by no means settled. Although the issue is not before me, it is not clear why a written contract providing for termination at will should not be considered a "contract" for

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[2/] Home Depot also provides a copy of *Conterez v. United Steel Workers*, 133 F.3d 926 (Table) (9th Cir. 1997). *Conterez* is an unpublished opinion and conspicuously bears the legend "Ninth Circuit Rule 36-3 provides that dispositions other than opinions or orders designated for publication are not precedential and should not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel." Courts within the Second Circuit honor such rules from other circuits. *See, e.g., Algie v. RCA Global Comm., Inc.*, 891 F. Supp. 839, 865 n.18 (S.D.N.Y. 1994) (declining to consider unpublished Ninth Circuit opinion because of Ninth Circuit local Rule 36-3). Defense counsel is reminded that citing to authorities not recognized by this Court raises concerns properly brought to the Eastern District Grievance Committee and is admonished not to buttress arguments, meritorious or not, with non-cognizable authority.

purposes of Section 1981. Further, I am not convinced that, even an oral agreement in which the parties express intentions to continue the employment relationship for the foreseeable future, should not be considered a contract, even if they also agree that should situations change they could terminate the contract at will. In all events, however, no evidence was introduced at trial regarding plaintiff's contract, lack of a contract, or expectations as to the duration of his employment with Home Depot. This, then, is not the case in which to further define the relationship between at-will employment and Section 1981, as the relevant evidence was not put before the jury. Accordingly, even were I to permit plaintiff to amend his complaint after the jury's verdict, he would be unable to plead or sustain a claim for violation of 42 U.S.C. § 1981.

B. New York Human Rights Law. Plaintiff also would have been unable to sustain a claim under the New York Human Rights Law, codified at Section 296 of the Executive Law.[3/] Plaintiff notes that the New York Court of Appeals has adopted the *McDonnell Douglas* framework for discrimination actions arising under the New York Human Rights Law. *See Song v. Ives Lab.*, 957 F.2d 1041, 1046 (2d Cir. 1992) (citing, *inter alia*,

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[3/] The law provides, in relevant part, that it shall be an unlawful discriminatory practice

> [f]or an employer ... because of the ... race ... of any individual, to refuse to hire or employ our to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

New York Exec. Law § 296(1)(a).

Matter of Miller Brewing Co. v. State Div. of Human Rights, 489 N.E.2d 745, 747 (N.Y. 1985)). Nevertheless, plaintiff has sued only Home Depot, not his supervisors, and under the New York Human Rights Law an "employer cannot be held liable for an employee's discriminatory act unless the employer became a party to it by encouraging, condoning, or approving it." *Totem Taxi v. State Human Rights Appeal Bd.*, 480 N.E.2d 1075 (N.Y. 1985). There was no evidence at trial from which a jury could have found that Home Depot as an entity, through a policy or practice, encouraged, condoned, or approved discriminatory action by any of its employees. Accordingly, plaintiff could not have sustained a claim against respondent under the New York Human Rights Law.

C. Intentional Infliction of Emotional Distress. Finally, plaintiff seeks to add a tort claim for intentional infliction of emotional distress. Under New York state law, "[t]he ... tort of intentional infliction of emotional distress has four elements: (1) extreme and outrageous conduct, (2) intent to cause severe emotional distress, (3) a causal connection between the conduct and the injury, and (4) severe emotional distress." *Bender v. New York*, 78 F.3d 787, 790 (2d Cir. 1996) (citing *Howell v. New York Post Co* 612 N.E.2d 699, 702 (N.Y. 1993)). The conduct must be "so outrageous in character and so extreme in degree as to go beyond all bounds of decency, and to be regarded as so atrocious and utterly intolerable in a civilized community." *Martin v. Citibank N.A.*, 762 F.2d 212, 220 (2d Cir. 1985).

In his motion papers, plaintiff asserts that the "cursing with racial epithets and vicious racially based hate literature" to which he was subjected, his being detained on the premises for a half an hour after his shift ended, and his being forced to wait four hours for medical attention constituted the intentional infliction of emotional distress. As to none of these did the evidence at trial support a tort claim. Taking the evidence in the light most favorable to plaintiff, the racial epithets and hate literature were directed at him by a Home Depot employee. An employer, however, is only liable for its employees' intentional torts when the employer could have reasonably anticipated the conduct." *Helbig v. City of New York*, 622 N.Y.S.2d 316, 318 (2d Dept. 1995). No evidence adduced at trial suggested that Home Depot could have anticipated that one of its employees would use racial epithets towards plaintiff or put hateful material in his locker. As for his detention on the premises, no evidence suggested that either occasion in which he was detained was intended to cause him distress, emotional or otherwise.

Thus, even were I to hold that Home Depot impliedly consented to try issues outside the four corners of the complaint, plaintiff would not be permitted to amend his complaint to state a cause of action under 42 U.S.C. § 1981, New York Executive Law § 296, or the tort of intentional infliction of emotional distress, because the evidence adduced at trial was insufficient to support any of these claims. Accordingly,

plaintiff's motion to amend the complaint is denied. I turn to defendant's motion to reduce the verdict.

Defendant's Motion to Reduce the Verdict

Under 42 U.S.C. § 1981a(b)(3), applicable to actions under Title VII, "the sum of compensatory damages awarded ... for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party" an amount determined by the number of employees of the defendant. In Home Depot's case, the cap is $300,000. *See* 42 U.S.C. § 1981a(b)(3)(D).

Home Depot urges that the jury's entire award of $1,210,000 should be reduced to $300,000. The text of the statute, however, is not as clear as Home Depot suggests, especially read in conjunction with 42 U.S.C. § 1981a(b)(2), which excludes from "compensatory damages" under § 1981a "backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964." At very least, then, that portion of the compensatory damages awarded by the jury representing backpay must be excluded from the statutory cap. *Accord Luciano v. Olsten*, 912 F. Supp. 663, 668 (E.D.N.Y. 1996), *aff'd*, 110 F.3d 210, 220 (2d Cir. 1997).

It is also possible to read the word "future" in the sentence "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and

other nonpecuniary losses" as applying not only to "pecuniary losses" but to all of the listed categories of damages. 42 U.S.C. § 1981a(b)(3). A more likely reading, however, and one consonant with the statutory scheme as a whole, is that the word "future" is intended to differentiate future pecuniary losses," included within the cap, from "past pecuniary losses," otherwise known as backpay, which are not included in the cap. *See* 42 U.S.C. § 1981a(b)(2).

An additional reading of the statute's text would suggest that compensatory damages and punitive damages are each subject to a cap of $300,000. This reading was dismissed by the First Circuit as "improbable." *See Hogan v. Bangor & Arostook R.R. Co.*, 61 F.3d 1034, 1037 (1st Cir. 1995); *accord EEOC v. AIC Security Investigations, Ltd.*, 823 F. Supp. 571, 576 (N.D. Ill. 1993) (statute imposes one cap on the sum of compensatory and punitive damages). The Second Circuit has not considered the issue but has affirmed a judge of this Court who apportioned compensatory damages to an asserted state law claim rather than to the federal claim in order to allocate the full $300,000 to punitive damages, stating that the cap would otherwise include both compensatory and punitive damages. *See Luciano*, 912 F. Supp. at 675-76, *aff'd*, 110 F.3d 210 (2d Cir. 1997).

Under this precedent, then, the $300,000 cap in the present case must include both compensatory and punitive damages. As the jury was instructed, however, compensatory damages includes backpay. Under § 1981a, backpay is separate from the

cap, and plaintiff is entitled to have any demonstrated backpay recovery excluded from the $300,000 cap. The evidence, however, does not establish plaintiff's hourly wage. No evidence was introduced regarding effort by Nedd to secure other employment nor regarding failure on his part to secure other employment. No evidence was introduced regarding any raises, for cost of living or for promotion, that Nedd would have received had he remained at Home Depot until the time of trial. Thus, although the statute would have allowed Nedd to recover demonstrated backpay in addition to the $300,000 imposed by the cap, in the absence of any relevant evidence the amount of his backpay is indeterminate and therefore speculative. Mr. Nedd's total recovery from the jury's verdict is therefore $300,000.

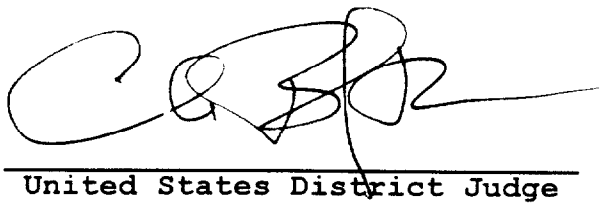
Plaintiff is also entitled to recover attorney's fees. Under 42 U.S.C. § 1988(b), "[i]n any action or proceeding to enforce a provision of section[] ... 1981a ... of this title, the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of the costs." Plaintiff having prevailed, he is entitled to be recompensed for the fees incurred by his counsel in defending against Home Depot's attempt to reduce the judgment, and for the fees incurred in preparing the motion to amend the complaint.

Accordingly, plaintiff is directed to settle a judgment on notice encompassing an award of $300,000 and a reasonable attorneys fee, documenting the fee arrangement and the hours spent by his counsel.

The Clerk of the Court is directed to furnish a filed copy of the within to all parties, to the magistrate judge, and to chambers.

SO ORDERED.

Dated : Brooklyn, New York
May 20 , 1998



United States District Judge